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20 **UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

21 **IN RE CAPACITORS ANTITRUST
LITIGATION**

22 MDL Case No 3:17-md-02801-JD

23 **DEFENDANTS' JOINT TRIAL BRIEF**

24 This Document Relates to:

The Honorable James Donato

25 *Avnet, Inc. v Hitachi Chemical Co., Ltd., et al.,*
Case No. 3:17-cv-07046-JD

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DEFENDANTS' JOINT TRIAL BRIEF

2 Avnet, Inc. (“Avnet”) alleges “a long-running conspiracy . . . to fix, stabilize, and maintain
3 prices for aluminum, tantalum, **and** film capacitors.” Amended Compl. ¶ 1, *Avnet, Inc. v. Hitachi*
4 *Chem. Co., Ltd.*, No. 3:14-cv-03264 (D. Ariz. Dec. 21, 2017) (“Am. Compl.”) (emphasis added),
5 ECF No. 1987. According to Avnet, several Japanese, Taiwanese, and American manufacturers of
6 aluminum, tantalum and film capacitors agreed among themselves to fix the prices for these
7 capacitors through a series of meetings and communications beginning “as early as November 2001”
8 and continuing “through at least January 2014.” *Id.* at ¶¶ 1, 6–7. The remaining Defendants¹ deny
9 that the conspiracy alleged by Avnet existed, that they knowingly participated in the alleged
10 conspiracy, and that their conduct caused Avnet any harm.

11 Avnet claims that Defendants, along with other alleged co-conspirators who are alleged to
12 account for 80% of Avnet's damages and who are not even named as defendants, violated Section
13 1 of the Sherman Act. To prevail at trial, Avnet will need to prove (1) the existence of the agreement
14 that it has alleged among or between competitors to fix the prices of aluminum, tantalum, and film
15 capacitors; (2) that each Defendant and each alleged co-conspirator knowingly (meaning voluntarily
16 and intentionally) entered into the alleged conspiracy with the intent to further some object or
17 purpose of the alleged conspiracy; (3) that the alleged conspiracy either occurred in or affected
18 interstate or import commerce; and (4) that the alleged conspiracy caused Avnet to pay more for
19 aluminum, tantalum, and film capacitors billed or shipped to it in the United States than it otherwise
20 would have. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795–96 (1993); *Monsanto Co.*
21 *v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 161
22 (9th Cir. 1989).

23 The evidence at trial will not support Avnet's allegations. Rather, the evidence at trial will
24 show neither the existence of the conspiracy that Avnet alleges nor the damages that it has claimed.

²⁶ ¹ Remaining Defendants are Hitachi Chemical Co., Ltd., Hitachi AIC Inc., Hitachi Chemical Co.
²⁷ America, Ltd., ELNA Co., Ltd., ELNA America Inc., Matsuo Electric Co., Ltd., Taitsu Corporation,
²⁸ Taitsu America, Inc., Nissei Electric Co., Ltd., Soshin Electric Co., Ltd., Soshin Electronics of
America, Inc., Nippon Chemi-Con Corporation, United Chemi-Con, Inc., Rubycon Corporation,
and Rubycon America Inc.

1 Based on that evidence, Defendants will ask the jury to return a verdict of not liable as to each
 2 Defendant.

3 **I. Existence of the Alleged Agreement**

4 At trial, Avnet will have the burden of proving the existence of an agreement between and
 5 among Defendants and other alleged co-conspirators (such as KEMET and AVX) that Avnet did
 6 not even name as defendants. *See* 15 U.S.C. § 1; *Toscano v. PGA*, 258 F.3d 978, 983 (9th Cir. 2001).
 7 The evidence will not support that claim. No witness has testified that an agreement to fix all
 8 capacitor prices in the United States ever existed or that there was an agreement to fix the prices for
 9 capacitors sold to Avnet. The meeting minutes so central to Avnet’s case focus on prices in Asia,
 10 not the United States. References to global demand and pricing trends are general in nature and do
 11 not show any intent to fix prices either globally or in the United States specifically. To the extent
 12 customers within the United States might have been mentioned, such evidence could indicate, at
 13 most, that prices *for certain specific customers* (none of whom were Avnet) may have been affected
 14 by the meetings in Asia.² That falls far short of establishing the sweeping conspiracy that Avnet has
 15 alleged.

16 **II. Knowing Participation in the Alleged Agreement**

17 Avnet will also be unable to prove, as it must, that all Defendants and co-conspirators
 18 knowingly participated in the alleged agreement, meaning that each “had a conscious commitment
 19 to a common scheme.” *Cnty. of Tuolumne v. Sonora Cnty. Hosp.*, 236 F.3d 1148, 1155 (9th Cir.
 20 2001) (quoting *Monsanto*, 465 U.S. at 768). This requires evidence that they intended to further the
 21 alleged conspiracy in some way—a burden that Avnet will not be able to shoulder. In particular, the
 22 evidence will not show that KEMET and AVX—who, again, account for more than 80% of Avnet’s
 23

24 ² This evidence will also undermine Avnet’s attempts to prove, as it must, that the meetings in Asia
 25 occurred in or affected interstate or import commerce. “[I]t is well established by now that the
 26 Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some
 27 substantial effect in the United States.” *Hartford Fire Ins. Co.*, 509 U.S. at 796. Here, the evidence
 28 will show that the meetings in Asia were not intended to, and in fact did not produce, “substantial
 effect” on the prices for capacitors in the United States. *Id.* The meetings focused on the Asian
 market, not the United States. And there is no evidence suggesting that the purported agreements
 reached during these meetings were ever incorporated into the pricing of aluminum, tantalum, and
 film capacitors sold generally (or to Avnet specifically) in the United States.

1 claimed damages—participated in the alleged conspiracy with the intention of furthering some
 2 aspect of the alleged conspiracy. *See Am. Compl.* ¶ 77. There is no direct evidence that KEMET
 3 and AVX agreed to fix prices with Defendants or the other alleged co-conspirators. Indeed, the
 4 evidence will establish that KEMET and AVX knew nothing about, and did not participate in, any
 5 of the meetings that form the core of Avnet's alleged conspiracy. Notes from each meeting
 6 systematically catalogue the attendees, yet KEMET and AVX never once attended any such meeting
 7 during the alleged conspiracy period. To the extent information about KEMET or AVX was
 8 discussed at these meetings, the relevant witnesses testified that they obtained such information
 9 from proper sources (such as their distributor customers), not from KEMET or AVX themselves.
 10 All witnesses questioned about the issue also testified that KEMET and AVX never attended these
 11 meetings and did not coordinate with Defendants regarding their prices for capacitors. Such
 12 testimony is particularly persuasive because these witnesses acknowledged that they discussed and
 13 coordinated some prices with their Japanese competitors. Moreover, many Defendants had already
 14 pled guilty to participating in a price-fixing conspiracy, and in doing so implicated *other* parties (not
 15 KEMET or AVX) in their guilty pleas. There is no reason why these pleas would not name KEMET
 16 or AVX if they were in fact part of the conspiracy. *See In re Citric Acid Litig.*, 996 F. Supp. 951,
 17 955–56 (N.D. Cal. 1998), *aff'd* 191 F.3d 1090 (9th Cir. 1999). Indeed, the evidence at trial will show
 18 that the electrolytic-capacitor-manufacturer Defendants viewed KEMET and AVX as vigorous
 19 competitors with whom no agreement was possible.

20 Avnet will accordingly present no direct evidence of the conspiracy it alleges. And its
 21 circumstantial evidence—evidence that KEMET and AVX's pricing patterns largely matched up
 22 with some Defendants' electrolytic capacitor prices—as a matter of law cannot establish that
 23 KEMET and AVX knowingly joined the alleged agreement with the intent to further the alleged
 24 price-fixing conspiracy. “A section 1 violation cannot . . . be inferred from parallel pricing alone,
 25 nor from an industry’s follow-the-leader pricing strategy.” *In re Citric Acid Litig.*, 191 F.3d 1090,
 26 1102 (9th Cir. 1999) (internal citations omitted). Avnet needs additional “plus factors” showing that
 27 the parallel pricing practices were intentionally coordinated and not the result of separate and
 28

1 legitimate business decisions. *See id.* But Avnet’s “additional evidence” amounts to nothing more
 2 than vague suggestions that KEMET and AVX may have exchanged some general information with
 3 particular alleged conspirators (or that they discussed legitimate supply agreements or potential
 4 acquisitions). The evidence will establish, however, that none of the information provided by
 5 KEMET and AVX to those specific competitors was competitively relevant to a price-fixing
 6 conspiracy, much less to the agreement Avnet alleges here. Moreover, the evidence will show that
 7 none of the information ever made its way to the meetings in Asia and that none of the information
 8 allegedly exchanged during the meetings in Asia ever ended up in the hands of KEMET and AVX.

9 Furthermore, the evidence will show that KEMET and AVX did not know about the
 10 meetings in Asia. Contrary to what Avnet suggests, KEMET and AVX could not have intended to
 11 provide information to a few select competitors for the purpose of funneling that information to
 12 meetings that they *did not participate in and knew nothing about*. Nor could KEMET and AVX
 13 have intended to join or further a global price-fixing conspiracy by providing general information
 14 to one or two Japanese companies in the context of actual or potential supply agreements or similar
 15 transactions when they knew nothing about their counterparts’ communications with competitors
 16 about prices and similar issues that were completely divorced from their legitimate transactions.
 17 Avnet will therefore be unable to prove that KEMET and AVX ever knowingly joined the alleged
 18 agreement with Defendants and other alleged co-conspirators, much less that they did so with the
 19 intent to further the alleged conspiracy.

20 Avnet likewise will be unable to prove that all the various companies it sued participated in
 21 the conspiracy alleged. So, for example, Soshin and Taitsu did not even make or sell aluminum or
 22 tantalum capacitors and did not attend the meetings among manufacturers of aluminum or tantalum
 23 capacitors. Taitsu and Soshin each manufactured only film capacitors, most of which are custom-
 24 made for specific customers and for specific applications. Soshin did not sell film capacitors in the
 25 United States. Film capacitors are not interchangeable with and cannot be substituted for or with
 26 aluminum or tantalum capacitors. And there are thousands of different types of film capacitors, most
 27 of which were custom-made products for particular customers and are therefore not susceptible to

1 price fixing. There will be no direct evidence of Soshin or Taitsu participating in the alleged
 2 conspiracy. And Avnet will be unable to prove the alleged conspiracy by inference because it would
 3 not be plausible and economically sensible for the jury to infer that Soshin and Taitsu conspired to
 4 fix the prices of products they did not sell. *See Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504
 5 U.S. 451, 468 (1992). Be it KEMET, AVX, Soshin, or other Defendants, Avnet will fail to prove
 6 that they and all of their many alleged conspirators knowingly participated in the alleged,
 7 overarching agreement to fix U.S. prices for three different types of capacitors.

8 **III. Antitrust Injury**

9 Avnet will also need to prove that it “has suffered an injury which bears a causal connection
 10 to the alleged antitrust violation.” *Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253, 1255 (9th Cir.
 11 2008) (quoting *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996), *as amended* (Jan. 15,
 12 1997)). Once again, however, the evidence will not bear this requirement out. To prevail, Avnet
 13 “must show that the alleged anticompetitive activity was ‘a material cause of the injury.’” *Catlin v.*
 14 *Wash. Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (quoting *Dolphin Tours, Inc. v. Pacifico*
 15 *Creative Serv., Inc.*, 773 F.2d 1506, 1509 (9th Cir. 1985)). Here, Avnet’s alleged injury is that it
 16 paid more for the aluminum, tantalum, and film capacitors that it purchased directly from the alleged
 17 conspirators in the United States than it otherwise would have. *See Am. Compl.* ¶¶ 333–36. But
 18 there is no evidence that Avnet overpaid for any capacitors that it purchased from Defendants or
 19 from any alleged co-conspirators, much less that it overpaid *because of* a series of meetings taking
 20 place halfway around the world.

21 To prove that it overpaid for capacitors purchased from Defendants and other alleged co-
 22 conspirators in the United States, Avnet will rely on the testimony of its expert, Dr. Marx. But Dr.
 23 Marx admitted during her deposition that she did not perform an Avnet-specific overcharge analysis.
 24 Marx Depo. Tr. at 48:15–50:21. She did not analyze whether Avnet was, in fact, overcharged for
 25 each and every—or frankly any—aluminum, tantalum, and film capacitor that it purchased from
 26 Defendants and the alleged co-conspirators. Instead, she purports to have calculated some sort of
 27 market-wide overcharge percentage that she merely applied to Avnet’s total purchases. Her analysis
 28

1 essentially assumes that, if prices were artificially high across the market, they must have been
 2 equally high as applied to Avnet.

3 The evidence will not support the notion that prices in the United States were universally
 4 and uniformly raised because of the meetings in Japan. Those meetings focused on the Asian market.
 5 To the extent the United States market was mentioned, pricing discussions zeroed in on specific
 6 customers—generally the U.S. subsidiaries of Japanese companies or large IT companies like Intel.
 7 Nothing in the records from the meetings indicates a broad agreement to raise prices for all
 8 aluminum, tantalum, and film capacitors throughout the United States. Even when certain
 9 Defendants pled guilty to fixing prices for capacitors in the United States, they did so only regarding
 10 “*certain* electrolytic capacitors.” *See, e.g.*, Plea Agreement at 4, *United States v. Elna*, No. 16-cr-
 11 365 ¶ 4 (N.D. Cal. Oct. 12, 2017), ECF No. 40 (emphasis added). Thus, the evidence will show that
 12 there was no overarching conspiracy to fix the prices for aluminum, tantalum, and film capacitors
 13 sold in the United States.³

14 The evidence will further show that, even if price increases in Asia indirectly affected prices
 15 paid in the United States, Avnet was not susceptible to such price increases. As one of the two largest
 16 electronic components distributors in the United States, Avnet both had and exercised significant
 17 buyer power over its capacitor suppliers. Avnet frequently negotiated favorable prices for the
 18 capacitors it purchased. It also had many alternative sources for capacitors that were not associated
 19 with any alleged conspirators to which it could (and did) turn if negotiations with alleged
 20 conspirators did not turn out favorably. Because capacitors of the same type are highly
 21

22 ³ The evidence at trial will also show that even if a conspiracy existed, Hitachi Chemical withdrew
 23 from any alleged conspiracy no later than March 2010. The evidence will show that Hitachi
 24 Chemical noisily announced its withdrawal from trade association meetings in August 2008 and
 25 stopped attending the meetings in Japan that form the core of Avnet’s claims. The evidence will
 26 further show that Hitachi Chemical completed its withdrawal by March 2010 when it sold its
 27 tantalum capacitor business to Holy Stone. As the DOJ concluded at the close of its investigation—
 28 and as the prosecutor represented to this Court during Hitachi Chemical’s change of plea hearing—the
 evidence shows that Hitachi Chemical’s sale of its tantalum business in March 2010 marked the
 end of its participation in any alleged conspiracy. Because Hitachi Chemical withdrew from any
 alleged conspiracy by March 2010, the jury should return a verdict reflecting that Hitachi Chemical
 is not liable for any damages after that date. Moreover, since Hitachi Chemical did not fraudulently
 conceal the alleged conspiracy after its withdrawal, Avnet’s claims against Hitachi Chemical are
 time barred, and therefore the jury should return a verdict of not liable as to Hitachi Chemical.

1 interchangeable, Avnet had no trouble meeting its needs through these alternative sources at
 2 competitive prices. Additionally, in numerous cases—including with certain Defendants—Avnet
 3 was further shielded from any price increases by arrangements in which end purchasers directly
 4 negotiated prices with manufacturers—meaning that Avnet received a contractually ensured fee for
 5 acting as the “middle man.” In this way, Avnet was immune from any radiating effects allegedly
 6 felt within the United States from price adjustments in Asia.

7 Because the evidence will show that at most the prices of only *some* capacitors sold in the
 8 United States may have been affected by the meetings held in Asia, Avnet will need to prove that
 9 the capacitors that it purchased were subject to an alleged overcharge. But it cannot do so. As the
 10 evidence will show, Avnet was not subjected to improper price increases. And Avnet has no data to
 11 suggest that it actually paid more for the capacitors that it purchased from Defendants and other
 12 alleged co-conspirators than it otherwise should have. Again, Avnet’s expert, Dr. Marx, tellingly
 13 did not even analyze that critical issue, instead simply assuming that Avnet itself was harmed by the
 14 alleged conspiracy.⁴ As a result, Avnet will not be able to carry its burden of proving an antitrust
 15 injury at trial.

16 **IV. Damages**

17 As a related but separate issue, Avnet will not be able to prove, as it must, that it has suffered
 18 a non-speculative quantum of damages. To prevail at trial, Avnet “must provide evidence such that
 19 the jury is not left to ‘speculation or guesswork’ in determining the amount of damages to award.”
 20 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988) (quoting *Dolphin Tours*, 773 F.2d
 21 at 1509–10). But Avnet’s sole source of damages calculations—Dr. Marx’s testimony—is the
 22 epitome of speculation and guesswork.

23 Dr. Marx’s market-wide overcharge analysis begins with a faulty premise: It expressly relies
 24 on the mistaken assumption that KEMET and AVX—who make up the vast majority of the
 25

26 ⁴ Defendants’ expert, Dr. Haider, did that analysis, however. She ran Dr. Marx’s model—despite its
 27 many flaws—on Avnet’s own capacitor purchases and found that it generates an overcharge
 28 percentage of “as low as a percent.” This dramatically smaller overcharge percentage no doubt
 explains why Dr. Marx refused to calculate overcharges for Avnet using its own purchases, as she
 should have done.

1 transactions underlying Dr. Marx's model—participated in the alleged conspiracy. *See* ECF No.
 2 162-2 ¶ 9. Dr. Marx created price indices for each capacitor type that were based “on the Cartel
 3 Participants’ capacitor sales that are billed to or shipped to customers in the United States,” which
 4 included sales from both KEMET and AVX. *See id.* ¶ 109. Because the evidence will show that
 5 KEMET and AVX were *not* “Cartel participants,” their data should not have been included in Dr.
 6 Marx’s overcharge percentage calculations. Having begun with that faulty premise, all of Dr. Marx’s
 7 damages calculations are completely unreliable. *See McGlinchey*, 845 F.2d at 807. This is especially
 8 true here where KEMET and AVX alone account for some 80% of Avnet’s purchases, giving that
 9 voluminous data a disproportionate influence on Dr. Marx’s damages analyses.

10 At bottom, Dr. Marx calculated Avnet’s damages by first generating a purported market-
 11 wide overcharge percentage for each type of capacitor and then simply applying those percentages
 12 to the total amount of purchases that Avnet made from each Defendant and alleged co-conspirator.
 13 Her model is based on multiple faulty assumptions. To begin with, Dr. Marx incorrectly assumes
 14 that market-wide damages reliably estimate individual damages for Avnet. As already discussed,
 15 however, there was no market-wide conspiracy that caused *all* prices for aluminum, tantalum, and
 16 film capacitors in the United States to reach artificially high levels. Only a small subset of capacitors
 17 sold by some Defendants and other alleged co-conspirators in the United States potentially could
 18 have been affected by the meetings in Asia. Thus, to properly calculate Avnet’s damages, Dr. Marx
 19 would have needed to analyze the specific prices paid on each and every aluminum, tantalum, and
 20 film capacitor that Avnet purchased from the alleged conspirators during the relevant time period
 21 (information that was available to Dr. Marx). She did not do this. Instead, Dr. Marx purports to have
 22 generated a “Fisher price index” based on *all* prices charged to *all* purchasers in the United States.
 23 Her model is completely unmoored from the reality of what Avnet paid and does not provide a
 24 reliable calculation of any Avnet-specific overcharges.

25 The slightest scrutiny of Dr. Marx’s regression analysis reveals additional flaws in her
 26 methodology and proves just how unreliable it is. First, Dr. Marx’s model generates a massive
 27 overcharge percentage for ceramic capacitor sales in the United States. But Avnet does not allege
 28

1 any agreement to fix prices for ceramic capacitors, nor is there any evidence of any such agreement.
 2 This false positive eviscerates Dr. Marx's model. Second, Dr. Marx's model generates annual
 3 overcharges through a regression that arbitrarily resets once a year, in January. Changing the month
 4 of that reset yields wildly different results. For example, the January reset that Dr. Marx used
 5 generates an average overcharge percentage of 20.3% for tantalum capacitors—a rate nearly *three*
 6 *times higher* than the rate calculated by the experts in the DPP trial.⁵ But if the regression reset in
 7 June, as opposed to January, that rate would shrink to just 1.6%. The variation for other capacitors
 8 is even more striking. For aluminum capacitors, a January reset results in an average overcharge
 9 rate of 13.5%. But a March reset would yield an absurd overcharge percentage of *negative* 328.4%.
 10 There is no justifiable reason for Dr. Marx to have selected January as the month of reset, and the
 11 arbitrariness of that decision and the results it yields render her damages model irreparably
 12 unreliable and speculative. This rigged approach is the proverbial thumb on the scale.

13 Even if Dr. Marx's model itself were not hopelessly speculative, Avnet still would not be
 14 able to present a non-speculative estimate of its damages to the jury. Avnet can recover only for
 15 overcharges that are actually attributable to Defendants' conduct. *See Image Tech. Servs., Inc. v.*
 16 *Eastman Kodak Co.*, 125 F.3d 1195, 1222 (9th Cir. 1997). It cannot recover for any alleged
 17 overcharges attributable to legitimate competition (here, for example, competition from KEMET
 18 and AVX, who were not part of the conspiracy that actually did occur in Asia) or other factors. *See*
 19 *id.* Dr. Marx fails to disaggregate any overcharges allegedly attributable to Defendants' conduct and
 20 those attributable to other causes, and Avnet has no other evidence to support its damages
 21 calculations. Avnet therefore will not be able to present the jury with a non-speculative number
 22 representing the damages that it allegedly sustained *as a result of Defendants' conduct*.

23 In summary, the evidence at trial will demonstrate that the conspiracy alleged by Avnet never
 24 existed, that Avnet suffered no harm as a result of Defendants' alleged conduct, and that Avnet
 25 cannot provide a non-speculative measure of its damages. Given this complete failure of proof, the
 26 jury will return a verdict of not liable as to each Defendant.

27 ⁵ In fact, all of Dr. Marx's damages model and calculations are wildly out of step with those
 28 presented by the experts in the DPP trial.

1 DATED: October 27, 2022

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ECF ATTESTATION

Pursuant to Civil L.R. 5-1(i)(3), the filer attests that concurrence in the filing of this document has been obtained from each of the other signatories thereto.

Executed this 27th day of October, 2022, at Washington, D.C.

/s/ Djordje Petkoski
Djordje Petkoski